

**Letter of Findings Number: 02-20110055P
Negligence Penalty
For the Year 2009**

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ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-3-4-12; IC § 6-3-4-13; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for late payment of 2009 income withholding tax. Taxpayer protested the penalty in letters dated October 11, 2010, and January 31, 2011.

The Department sent correspondence to Taxpayer dated February 11, 2011, with respect to additional evidence supporting penalty waiver. Taxpayer did not reply to the Department's letter. This Letter of Findings, therefore, is written based on the information in Taxpayer's protest file and other Department records relating to Taxpayer.

I. Tax Administration – Negligence Penalty.

DISCUSSION

For the year at issue Taxpayer was required to file and pay its income tax withholding on December 15, 2009. Taxpayer at the time remitted a payment of \$500. Subsequently, Taxpayer filed for an extension to file its composite income tax return to July 15, 2010 at which time Taxpayer remitted a tax payment of \$47,278.

Taxpayer received a proposed assessment of income tax, penalty, and interest dated September 27, 2010, for late payment of tax due for the year ended September 30, 2009. Taxpayer states that it remitted the interest, but protests the imposition of penalty for late payment of 2009 income tax. In its January 31, 2011, protest letter Taxpayer states:

[Taxpayer] could have chosen to file an incorrect return, and not filed a Composite return, and would have only been assessed a \$500 penalty (PL 211-2007 SEC. 27, 44, 58). However, because the Company tried to comply with the new statute, and did file a Composite return, it is being assessed a penalty of \$4,727.80. We believe this outcome to be unjust and not the Indiana Department of Revenue's intended result.

Taxpayer alludes to various statutes which are set out below for Taxpayer's reference and future compliance.

IC § 6-3-4-12 sets out the requirement for partnerships to withhold income tax on behalf of its nonresident partners. P.L.211-2007, SEC.26 added subsections (h) and (i) for tax years beginning after December 31, 2007 (effective Jan. 1, 2008).

(a) Every partnership shall, at the time that the partnership pays or credits amounts to any of its nonresident partners on account of their distributive shares of partnership income, for a taxable year of the partnership, deduct and retain therefrom the amount prescribed in the withholding instructions referred to in section 8 of this chapter. Such partnership so paying or crediting any nonresident partner:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and retained under this section and shall not be liable to such partner for the amount deducted from such payment or credit and paid over in compliance or intended compliance with this section; and

(2) shall make return of and payment to the department monthly whenever the amount of tax due under [IC 6-3](#) and [IC 6-3.5](#) exceeds an aggregate amount of fifty dollars (\$50) per month with such payment due on the thirtieth day of the following month, unless an earlier date is specified by section 8.1 of this chapter.

Where the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) does not exceed fifty dollars (\$50) per month, then such partnership shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

(b) Every partnership shall, at the time of each payment made by it to the department pursuant to this section, deliver to the department a return upon such form as shall be prescribed by the department showing the total amounts paid or credited to its nonresident partners, the amount deducted therefrom in accordance with the provisions of this section, and such other information as the department may require. Every partnership making the deduction and retention provided in this section shall furnish to its nonresident partners annually, but not later than thirty (30) days after the end of its taxable year, a record of the amount of tax deducted and retained from such partners on forms to be prescribed by the department.

(c) All money deducted and retained by the partnership, as provided in this section, shall immediately upon such deduction be the money of the state of Indiana and every partnership which deducts and retains any

amount of money under the provisions of [IC 6-3](#) shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in [IC 6-3](#). Any partnership may be required to post a surety bond in such sum as the department shall determine to be appropriate to protect the state of Indiana with respect to money deducted and retained pursuant to this section.

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to partnerships subject to the provisions of this section, and for these purposes any amount deducted, or required to be deducted and remitted to the department under this section, shall be considered to be the tax of the partnership, and with respect to such amount it shall be considered the taxpayer.

(e) Amounts deducted from payments or credits to a nonresident partner during any taxable year of the partnership in accordance with the provisions of this section shall be considered to be in part payment of the tax imposed on such nonresident partner for his taxable year within or with which the partnership's taxable year ends. A return made by the partnership under subsection (b) shall be accepted by the department as evidence in favor of the nonresident partner of the amount so deducted for his distributive share.

(f) This section shall in no way relieve any nonresident partner from his obligations of filing a return or returns at the time required under [IC 6-3](#) or [IC 6-3.5](#), and any unpaid tax shall be paid at the time prescribed by section 5 of this chapter.

(g) Instead of the reporting periods required under subsection (a), the department may permit a partnership to file one (1) return and payment each year if the partnership pays or credits amounts to its nonresident partners only one (1) time each year. The return and payment are due not more than thirty (30) days after the end of the year.

(h) A partnership shall file a composite adjusted gross income tax return on behalf of all nonresident individual partners. The composite return must include each nonresident individual partner regardless of whether or not the nonresident individual partner has other Indiana source income.

(i) If a partnership does not include all nonresident partners in the composite return, the partnership is subject to the penalty imposed under [IC 6-8.1-10-2.1\(j\)](#).

(Emphasis added).

Similarly, IC § 6-3-4-13 sets out the withholding requirements for corporations which are exempt from tax under IC § 6-3 pursuant to IC § 6-3-2-2.8(2). P.L. 211-2007, Sec. 27 added subsection (k) and amended subsection (j) to require such corporation to file a composite adjusted gross income tax return for tax years beginning after December 31, 2007 (effective January 1, 2008). IC § 6-3-4-13 reads:

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8\(2\)](#) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

(1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and

(2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

(b) Every corporation shall, at the time of each payment made by it to the department pursuant to this section, deliver to the department a return upon such form as shall be prescribed by the department showing the total amounts paid or credited to its nonresident shareholders, the amount withheld in accordance with the provisions of this section, and such other information as the department may require. Every corporation withholding as provided in this section shall furnish to its nonresident shareholders annually, but not later than the fifteenth day of the third month after the end of its taxable year, a record of the amount of tax withheld on behalf of such shareholders on forms to be prescribed by the department.

(c) All money withheld by a corporation, pursuant to this section, shall immediately upon being withheld be the money of the state of Indiana and every corporation which withholds any amount of money under the provisions of this section shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in [IC 6-3](#). Any corporation may be required to post a surety bond in such sum as the department shall determine to be appropriate to protect the state of Indiana with respect to money withheld pursuant to this section.

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.

(e) Amounts withheld from payments or credits to a nonresident shareholder during any taxable year of the corporation in accordance with the provisions of this section shall be considered to be a part payment of the

tax imposed on such nonresident shareholder for his taxable year within or with which the corporation's taxable year ends. A return made by the corporation under subsection (b) shall be accepted by the department as evidence in favor of the nonresident shareholder of the amount so withheld from the shareholder's distributive share.

(f) This section shall in no way relieve any nonresident shareholder from the shareholder's obligation of filing a return or returns at the time required under [IC 6-3](#) or [IC 6-3.5](#), and any unpaid tax shall be paid at the time prescribed by section 5 of this chapter.

(g) Instead of the reporting periods required under subsection (a), the department may permit a corporation to file one (1) return and payment each year if the corporation pays or credits amounts to its nonresident shareholders only one (1) time each year. **The withholding return and payment are due on or before the fifteenth day of the third month after the end of the taxable year of the corporation.**

(h) If a distribution will be made with property other than money or a gain is realized without the payment of money, the corporation shall not release the property or credit the gain until it has funds sufficient to enable it to pay the tax required to be withheld under this section. If necessary, the corporation shall obtain such funds from the shareholders.

(i) If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under [IC 6-8.1-10](#).

(j) A corporation described in subsection (a) shall file a composite adjusted gross income tax return on behalf of all nonresident shareholders. The composite return must include each nonresident individual shareholder regardless of whether or not the nonresident individual shareholder has other Indiana source income.

(k) If a corporation described in subsection (a) does not include all nonresident shareholders in the composite return, the corporation is subject to the penalty imposed under [IC 6-8.1-10-2.1\(j\)](#). (Emphasis added).

IC § 6-8.1-10-2.1 sets out the terms of liability for penalty. P.L. 211-2007, Sec. 54, amended the statute to add subsection (j) for tax years beginning after December 31, 2007 (effective January 1, 2008). Later, P.L. 182-2009 (22), Sec. 258, amended IC § 6-8.1-10-2.1 by rewriting subsection (h) (effective January 1, 2010), which read:

A corporation which otherwise qualifies under [IC 6-3-2-2.8\(2\)](#) but fails to withhold and pay any amount of tax required to be withheld under [IC 6-3-4-13](#) shall pay a penalty equal to twenty percent (20[percent]) of the amount of tax required to be withheld under [IC 6-3-4-13](#). This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

Under IC § 6-8.1-10-2.1 penalty waiver is permitted if the taxpayer shows that the failure to pay the full or required amount of the tax was due to reasonable cause and not due to willful neglect:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department; the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative

showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

(f) The department shall adopt rules under [IC 4-22-2](#) to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.

(g) A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars (\$10) for each day that the return is past due, up to a maximum of two hundred fifty dollars (\$250).

(h) A:

- (1) corporation which otherwise qualifies under [IC 6-3-2-2.8\(2\)](#);
- (2) partnership; or
- (3) trust;

that fails to withhold and pay any amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#) shall pay a penalty equal to twenty percent (20[percent]) of the amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#). This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

(i) Subsections (a) through (c) do not apply to a motor carrier fuel tax return.

(j) If a partnership or an S corporation fails to include all nonresidential individual partners or nonresidential individual shareholders in a composite return as required by [IC 6-3-4-12\(h\)](#) or [IC 6-3-4-13\(j\)](#), a penalty of five hundred dollars (\$500) per partnership or S corporation is imposed on the partnership or S corporation.

(Emphasis added).

The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer's statement that it is being unjustly assessed penalty where, had it not complied with the requirement to file a composite return, it would have only been subject to a \$500 penalty rather than the current ten-percent penalty is incorrect. Had Taxpayer not filed its return, it would have been subject to a ten-percent "failure to timely pay tax" penalty under [IC § 6-8.1-10-2.1](#). Then, Taxpayer may also have been assessed a \$500 penalty for failing to include all the non-resident partners on the return Taxpayer was required to file.

Taxpayer was assessed the ten-percent negligence penalty for its late payment of income withholding tax. Taxpayer paid a mere \$500 in income withholding tax on December 15, 2009 when that return was due.

Taxpayer has not made an affirmative showing as to why its underpayment of tax was due to reasonable cause and not negligence. [IC § 6-8.1-10-2.1\(d\)](#).

FINDING

Taxpayer's protest is respectfully denied.

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